BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAIME GALVAN	)	
Claimant	)	
	)	
VS.	)	
	)	
S & S TRUCKING	)	
CROWLEY MARITIME CORP.	)	
Respondents	)	
	)	Docket No. **1,060,043**
AND	)	
	)	
UNINSURED	)	
STANDARD FIRE INSURANCE CO.	)	
Insurance Carriers	)	
	)	
AND/OR	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the August 8, 2012 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller. Chris Clements, of Wichita, Kansas, appeared for claimant. Steve Brooks of Liberal, Kansas, appeared for respondent, S & S Trucking (S & S), and Angel Salas. Vincent Burnett, of Wichita, Kansas, appeared for respondent, Crowley Maritime Corporation (Crowley), and its insurance carrier, Standard Fire Insurance Co. Terry Malone, of Dodge City, Kansas, appeared for the Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by Judge Fuller and consists of the preliminary hearing transcript dated August 3, 2012, with exhibits; the deposition of Jaime Galvan taken June 5, 2012, with exhibits; the deposition of Angel Salas taken June 5, 2012, with exhibits; and all pleadings contained in the administrative file.

ISSUES

Judge Fuller found claimant failed to prove that an employer/employee relationship existed at the time of his accident. Judge Fuller ruled that claimant was an owner/operator of a motor vehicle that was leased or contracted to a licensed motor carrier, which she identified as Crowley, and thus was not an employee.

Claimant asserts Judge Fuller erred in finding claimant was an owner/operator and not an employee. Claimant argues he is an employee of S & S and a statutory employee of Crowley. S & S argues Judge Fuller's Order should be affirmed. Crowley argues claimant is an independent contractor and not entitled to workers compensation benefits.

The issues raised on review are:

(1) Does K.S.A. 2011 Supp. 44-503c prevent claimant from recovering workers compensation benefits?

(2) Is claimant an employee of S & S?

(3) Is claimant a statutory employee of Crowley?

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact:

Claimant is a truck driver. S & S was a licensed motor carrier operating out of Ulysses, Kansas.[1] S & S was owned by Angel Salas. Crowley, a broker, arranged for S & S to deliver milk for the Dairy Farmers of America, Inc.[2]

Claimant began hauling loads exclusively for S & S in September 2011. Claimant wanted to buy a 2000 Freightliner semi-truck, but due to financing issues, had Mr. Salas purchase the truck. The truck was titled in Mr. Salas' name. Claimant was buying the truck from Mr. Salas. Mr. Salas deducted a $536 monthly truck payment from claimant's paycheck, which was the same amount Mr. Salas paid the bank. Mr. Salas would also charge claimant 9% for securing the load, and deduct money for fuel, taxes, tags and insurance on the truck. Mr. Salas would make sure that claimant had money to cover gas, repairs and maintenance.

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[1] Salas Depo., Ex. 3 at 9.

[2] *Id.* at 1, 9.

Mr. Salas would contact claimant by telephone using text messaging to communicate his next job route and when delivery was due. Claimant testified Mr. Salas would give him a trip daily and once claimant returned he would received another trip.

After the trailer was unloaded, claimant would contact Mr. Salas to let him know that claimant would be available for another load. Sometimes claimant would have to go pick up a load somewhere else on the same day.

Claimant received payment by a personal check or cash and he did not receive a 1099 or W-2 form at the end of the year. Mr. Salas did not take out any unemployment taxes from claimant's wages.

Claimant would contact Crowley to confirm that Mr. Salas had been paid and also inquired about receiving pay for the wait time. Claimant testified that Crowley would pay Mr. Salas and then Mr. Salas would pay him.

There was a time when Mr. Salas thought he might lose a part of his business. He advised the drivers that they may be let go and need to find alternate work.

On March 4, 2012, claimant was hauling a trailer load of milk from Syracuse, Kansas, to Portales, New Mexico. It was a dark early morning when claimant came upon another truck parked on the side of the road and missed the upcoming curve, lost control of the truck and it rolled. Claimant was able to get out of the semi-truck and look for help. He was transported by ambulance to a hospital in Cimarron, Kansas. X-rays were taken and claimant was informed that he had a broken disk in his back and also broken ribs.

Claimant was air flighted to St. Francis hospital in Wichita, Kansas, where he remained hospitalized until March 9, 2012. Claimant was fitted for a brace which he wears all the time except when sleeping. Dr. Scott Haskins released claimant on March 9, 2012, restricting claimant from lifting over 10 pounds and driving. Claimant was instructed to follow-up with Dr. Grundmeyer in 6 weeks. Dr. Grundmeyer assigned temporary work restrictions.

The truck was totaled. The truck only had cargo and liability insurance, but no insurance to cover property damage to the truck itself. Claimant did not receive any payments from any insurance company for the truck, nor were his medical bills paid. Claimant still owes Mr. Salas approximately $8,000 for the truck.

S & S ceased operating shortly after claimant's accident. S & S did not have workers compensation coverage on March 4, 2012. Claimant did not have an occupational accident insurance policy.

Judge Fuller's August 8, 2012 Order stated:

That pursuant to K.S.A. 44-503c, it is found that the Claimant was an owner/operator and the exclusive driver of the motor vehicle that was wrecked. All expenses for the semi-truck were deducted from the Claimant's pay by S & S Trucking who was selling the semi to the Claimant. This included vehicle payments, tags, taxes, insurance and maintenance expenses. The Claimant could accept or reject loads given to him by S & S Trucking. Crowley was a licensed motor carrier within the meaning of K.S.A. 44-503 as evidenced by deposition exhibit "3" to the deposition of Angel Salas. S & S Trucking was subcontracting to Crowley. Therefore, the Claimant, having been found to be an owner/operator, would not be considered an employee of Crowley, who is a licensed motor carrier, or an employee of S & S Trucking who was subcontracted to Crowley.

PRINCIPLES OF LAW

K.S.A. 44-503 states, in part:

(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

K.S.A. 2011 Supp. 44-503c provides, in part:

(a)(1) Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an

occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

(2) As used in this subsection:

(A) 'Motor vehicle' means any automobile, truck-trailer, semitrailer, tractor, motor bus or any other self-propelled or motor-driven vehicle used upon any of the public highways of Kansas for the purpose of transporting persons or property;

(B) 'licensed motor carrier' means any person, firm, corporation or other business entity that holds a certificate of convenience and necessity, a certificate of public service, an interstate license as a common or exempt carrier from the state corporation commission or is required to register motor carrier equipment pursuant to 49 U.S.C. § 11506; and

(C) 'owner-operator' means an individual who is the owner of a single motor vehicle that is driven exclusively by the owner under a lease agreement or contract with a licensed motor carrier.

. . .

(c) For purposes of subsection (b) of this section only, 'owner-operator' means a person, firm, corporation or other business entity that is the owner of one or more motor vehicles that are driven exclusively by the owner or the owner's employees or agents under a lease agreement or contract with a licensed motor carrier; provided that neither the owner-operator nor the owner's employees are treated under the term of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq.*, the federal social security act, 42 U.S.C. § 301 *et seq.*, the federal unemployment tax act, 26 U.S.C. § 3301 *et seq.*, and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq.*

K.S.A. 44-532a states, in part:

(a) If an employer has no insurance . . . and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, . . . the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund.

ANALYSIS

Plain and unambiguous workers compensation statutes must be applied as written.[3] An "owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be . . . a contractor or an employee of the licensed motor carrier . . . or an employee of the licensed motor carrier . . . *if the owner-operator is covered by an occupational accident insurance policy* and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of [various federal laws] (emphasis added)."[4]

Claimant was not covered by an occupational accident insurance policy. Whether it is claimant's responsibility or the motor carrier's responsibility to obtain the policy, the statute only applies if claimant is covered by an occupational accident insurance policy.[5]

Second, while claimant was the exclusive driver and operator of the vehicle, the record does not establish that he was an owner of the vehicle. Claimant did not possess title to the vehicle; Mr. Salas held the title. Mr. Salas could repossess the vehicle if claimant failed to make payment. Claimant intended that the truck *would be* his, but acknowledged Mr. Salas owned the truck until claimant paid it off. Claimant did not register the vehicle, pay for tags, have title or insurance.

Third, there is no proof claimant leased or contracted the truck to any entity, including S & S, the only respondent that was a licensed motor carrier. For all of these reasons, K.S.A. 44-503c does not preclude the possibility that claimant was an employee.

The parties dispute claimant's status as an employee, independent contractor or statutory employee. It is often difficult to determine whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.[6] There is no absolute rule for determining whether an individual is an independent contractor or an employee.[7]

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[3] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, ¶ 1, 214 P.3d 676 (2009).

[4] K.S.A. 44-503c(a)(1).

[5] See *Saeger v. OIX, Inc.*, No. 1,00,210, 2002 WL 985388 (Kan. WCAB April 2, 2010) ("[T]he . . . claimant is covered by an occupational accident insurance policy . . . . Accordingly, claimant may not recover benefits . . . .") and *Scanlon v. Landstar Inway*, No. 1,003,145, 2005 WL 2181223 (Kan. WCAB Aug. 5, 2005) ("[C]laimant had occupational accident insurance coverage . . . . Consequently . . . claimant is precluded from being respondent's employee under K.S.A. 44-503c.").

[6] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[7] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

The relationship of the parties depends upon all the facts, and the label they use is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[8]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[9] Still, every case is determined on individual facts and circumstances.[10] *Hill*[11] sets forth various factors, apart from the employer's right of control, including:

(1) the right of the employer to require compliance with instructions;

(2) the extent of any training provided by the employer;

(3) the extent the worker's services are integrated into the employer's business;

(4) the requirement that the services be provided personally by the worker;

(5) the worker's hiring, supervision and paying of assistants;

(6) existence of a continuing relationship between the worker and employer;

(7) the degree of establishment of set work hours;

(8) the requirement of full-time work;

(9) the degree of performance of work on the employer's premises;

(10) the degree to which the employer sets the order and sequence of work;

(11) the necessity of oral or written reports;

(12) whether payment is by the hour, day or job;

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[8] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[9] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 102-03, 689 P.2d 787 (1984).

[10] *Id.* at 102.

[11] *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part* 292 Kan. 17, 23, 248 P.3d 1287 (2011).

(13) whether the employer pays business or travel expenses of the worker;

(14) whether the employer furnishes tools, equipment and material;

(15) the incurrence of significant investment by the worker;

(16) the ability of the worker to incur a profit or loss;

(17) whether the worker can work for more than one firm at a time;

(18) whether the worker's services are made available to the general public;

(19) whether the employer has the right to discharge the worker; and

(20) whether the employer has the right to terminate the worker.

Claimant did not characterize his arrangement with S & S as a master-servant situation. Mr. Salas gave claimant minimal instructions where to pick up a load and where and when it should be delivered. Claimant picked the route. Claimant could turn down jobs and was not required to check in with Mr. Salas regarding job progress. These factors tend to show an independent contractor relationship between claimant and S & S.

Mr. Salas twice testified that his company had control over the claimant. While he testified that the drivers were not employees, he admitted having authority over the drivers:

Q. But [claimant] did run under your authority?

A. Yes, he did.[12]

At the Preliminary Hearing, Mr. Salas testified that he also terminated drivers:

Q. You do recall at your deposition one of us had asked you specifically had you ever fired anybody at Crowley's insistence or direction or whatever. Do you remember that?

A. Yes, sir.

Q. You indicated you weren't sure. Did you check your records after that deposition?

A. Yes, I did.

Q. And what was the answer to our question?

[12] Salas Depo. at 18-19.

A. Yeah, they had asked me to get rid of two guys.

Q. And did you actually do that?

A. I had to, yes.[13]

S & S had the right to terminate the services of the drivers, including claimant. Such right was not just theoretical, but actual and real, as Mr. Salas terminated two drivers at Crowley's suggestion. The ability to terminate a worker demonstrates control.

Other factors tend to show S & S was more an employer. S & S needed drivers to function as a business. Claimant worked exclusively for S & S for six months before his accident. Pay sheets show claimant worked full-time for S & S. The record does not show that claimant worked for other trucking companies or worked for the general public while he worked for S & S. Based on these factors, but primarily based on the right of control that S & S had to terminate drivers, this Board Member concludes that claimant was an employee of S & S on the date of accident.

Another issue is whether claimant was a statutory employee of Crowley under K.S.A. 44-503. The Kansas Supreme Court set forth a test to determine if work is part of a principal's trade or business: (1) is the work by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business? (2) is the work by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal?[14]

The record does not fully explain Crowley's trade or business, merely indicating that Crowley is a "producer."[15] Crowley would match a supplier of goods, such as the Dairy Farmers of America (DFA), with a transport company, such as S & S, for the delivery of product. There is no proof in the record that Crowley is in the trade or business of trucking. There is no proof that Crowley hired its own truckers. There is no proof in the record that Crowley contracted with any entity, such as the DFA, to deliver milk, or that Crowley subsequently subcontracted such contract work to S & S. Quite simply, Crowley was not claimant's statutory employer. The mere fact that Crowley would ask S & S to terminate certain drivers does not mean that Crowley was the employer of such drivers.

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[13] P.H. Trans. at 19-20.

[14] *Hanna v. CRA, Inc.*, 196 Kan. 156, 159-60, 409 P.2d 786 (1966).

[15] Salas Depo., Ex. 3 at 1, 9.

CONCLUSION

This Board Member concludes that Crowley was not claimant's statutory employer pursuant to K.S.A. 44-503.

S & S was claimant's employer. Unfortunately, S & S had no workers compensation insurance, is no longer a functioning business and lacks the financial ability to pay claimant's benefits. Pursuant to K.S.A. 44-532a, the Fund is responsible for claimant's benefits.

Regarding temporary total disability benefits, claimant was likely temporarily and totally disabled from the date of accident at least until he was seen by Dr. Grundmeyer or Dr. Grundmeyer's staff. The claimant started working for Friesen Trucking, apparently in either June or July 2012. The record is unclear as to an ending date for payment of temporary total disability benefits. This issue is remanded to Judge Fuller.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[17]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated August 8, 2012, is reversed on the issue of employer-employee relationship and remanded on the temporary total disability issue. The Fund is responsible for claimant's medical bills identified in Galvan Exhibit 2, up to what the Kansas Fee Schedule allows.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

[16] K.S.A. 44-534a.

[17] K.S.A. 2011 Supp. 44-555c(k).

e: Chris Clements, Attorney for Claimant
cac@cl.kscoxmail.com; rdl@cl.kscoxmail.com
Vincent Burnett, Attorney for Crowley Maritime Corp.
Vburnett@MTSQH.com
Steve Brooks, Attorney for S & S Trucking
nanbop@swko.net
Terrance J. Malone, Attorney for the Workers Compensation Fund
tjmalone@swbell.net
Pamela J. Fuller, Administrative Law Judge